IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	:	Case No. 1:99CV1193
	:	
Plaintiff,	:	
	:	
-vs-	:	Judge Dan Aaron Polster
	:	
JOHN DEMJANJUK,	:	
	:	
Defendant.	:	

REPLY BRIEF OF JOHN DEMJANJUK
IN SUPPORT OF MOTION PURSUANT TO
FED. R. CIV. P. 60

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Introduction

John Demjanjuk, by his undersigned counsel, files this reply memorandum in support of his motion pursuant to Fed. R. Civ. P. 60(b)(6) and 60(d)(1) and (3) for relief from the final judgment and order, and to set aside that final judgment that led to his denaturalization and deportation to the Federal Republic of Germany where he now resides. He files this reply pursuant to the Court's order of July 21, 2011. Exhibit A to this reply brief is a second digitized time line that shows the point in court proceedings when the documents discussed in this brief were created.

The Governments's Admissions and Failed Promises

The government now admits it had hundreds of pages of relevant, responsive documents that would have merited investigation. These documents would have been admissible in evidence or would have led to the discovery of admissible evidence. Many of them would have been admissible as government reports under Fed. R. Evid. 803(8), and, because they were authored by responsible government officials, would have been admissions of a party opponent. *See, e.g., Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170 (1988) (holding that portions of investigatory reports otherwise admissible under Rule 803(8)(C) are not inadmissible merely because they state a conclusion or opinion); *Bank of Lexington & Trust Co. v. Vining-Sparks Securities*, 959 F.2d 606, 616 (6th Cir. 1992) (holding that opinions, conclusions and evaluations, as well as facts, fall within Rule 803(8)(C) exception); *Alexander v. CareSource*, 576 F.3d 551, 561-62 (6th Cir. 2009); *Chavez v. Carranza*, 559 F.3d 486, 496(6th Cir. 2009).

The government's explanations for its failure to produce these materials are not legally sufficient. The government has previously stated, "The court of appeals' published criticism of the government, its grant of interim relief (which allowed Demjanjuk to reenter the United States), and

its vacation of the extradition judgment were more than sufficient to teach prosecutors a lesson." In a footnote ending this sentence, it continued, "In response to the Sixth Circuit's 1992 reopening of the extradition proceeding, the Office of Special Investigations has taken steps to ensure that its attorneys exceed even the expansive discovery obligations codified in the December 1993 amendments to the Federal Rules of Civil Procedure." *See United States v. John Demjanjuk*, Case No. C77-923, The United States' Opposition to Defendant's Motions to Reopen, to Set Aside Judgment, and to Dismiss with Prejudice," filed Nov. 22, 1994, at 9 and n.5.

This was not the first time the government promised to comply with the Federal Rules of Civil Procedure. Allan A. Ryan, Jr. was a lawyer in private practice, an assistant Solicitor General, and Deputy Director and then Director of OSI (1980-83). He wrote *Quiet Neighbors*: *Prosecuting Nazi War Criminals in America*, an account of his OSI activities. In 1993, he was a witness in special hearings convened by the Sixth Circuit to investigate government misconduct in its denaturalization and extradition of Mr. Demjanjuk. The hearings took place before Judge Thomas A. Wiseman, Jr., a United States District Judge for the Middle District of Tennessee. Mr. Ryan testified that under his leadership, OSI's discovery policy required compliance with the Federal Rules of Civil Procedure, including the broad definition of discoverability. Wiseman Hearing Tr., Jan. 29, 1993, at 28-31 (Deft. Reply, Exh. B). In addition, it was OSI practice "to turn over exculpatory evidence even though it may not have literally been requested." *Id.* at 32-33. Soon after he joined OSI, "it became very clear to me that the government had superior access to information. We had much more resources than the defendants had because we had historians, investigators, travel budgets and also we were the government." *Id.* at 36-37.

The government did not do what it promised. If it had done so, we would not be in these proceedings discussing hundreds of pages of documents from FBI files never before produced even though they are undisputably relevant. Rather than act upon its duty to follow the expansive discovery obligations in the Federal Rules of Civil Procedure — or even broader standards that it promised this Court its attorneys were following — the government paid only lip service to these obligations. The government's lawyers now report that the largest law enforcement and investigative agency in the country, which operates under the same umbrella organization as those lawyers, was asked back in 1979 to produce materials that might be relevant to this case, but then was never asked again.

Law of the Case and Res Judicata

This is not about unwinding a denaturalization proceeding because of a technicality. This is about unwinding a denaturalization proceeding because of outrageous governmental conduct over years and years. This is about our government failing to follow rules the Sixth Circuit Court of Appeals made crystal clear 18 years ago. The government's expressions of repentance and a promise to reform its ways were compelled by some of the bluntest language ever to have come from the Sixth Circuit.

> We believe *Brady* [*v. Maryland*, 373 U.S. 83 (1963),] should be extended to cover denaturalization and extradition cases where the government seeks denaturalization or extradition based on proof of alleged criminal activities of the party proceeded against. If the government had sought to denaturalize Demjanjuk only on the basis of his misrepresentations at the time he sought admission to the United States and subsequently when he applied for citizenship, it would have been only a civil action. The government did not rest on those misrepresentations, however. Instead, the respondents presented their case as showing that Demjanjuk was guilty of mass murder.

> The OSI prosecutors knew that *Brady* requires disclosure of exculpatory information in criminal cases. The Director of OSI, Mr. Ryan, testified that it is "fundamentally unfair" not to follow the *Brady* principle in OSI cases and that he intended for the office to follow this principle of full disclosure of exculpatory materials.... It is not sufficient to say, as the Special Master concludes, that no prosecutorial misconduct occurred under the *Brady* principle because no particular individual at OSI has been proved to have acted in "bad faith" with the express intent of suppressing exculpatory evidence.
>
> In *Brady* itself, the Court stated that the failure to disclose material information is a due process violation "irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 86 ... (1963). Otherwise, the prosecutor can proclaim that his heart is innocent and his failure inadvertent, a claim hard to disprove, while at the same time completely disregarding his duty to disclose.
>
> The Court has also made plain that the prosecution cannot escape its disclosure obligation by compartmentalizing information or failing to inform others in the office of relevant information. In *Giglio v. United States*, 405 U.S. 150 ... (1972), the government made the same "the-right-hand-did-not-know-what-the-left-hand-was-doing" argument as it makes here. The Court was quick to reject this excuse as a justification for withholding exculpatory material. The Court pointed out that "the prosecutor's office is an entity and as such it is the spokesman for the government." The Court held that the prosecutor's office — here OSI — is responsible as a corporate entity for disclosure.
>
> * * * * *
>
> We believe the OSI attorneys had a constitutional duty to produce "all evidence favorable to an accused [Demjanjuk]," which the Special Master found he had requested and that was "material ... to guilt or to punishment irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196.
>
> Thus, we hold that the OSI attorneys acted with reckless disregard for the truth and for the government's obligation to take no steps that prevent an adversary from presenting his case fully and fairly. This was fraud on the court in the circumstances of this case where, by recklessly assuming Demjanjuk's guilt, they failed

> to observe their obligation to produce exculpatory materials requested by Demjanjuk.

Demjanjuk v. Petrovsky, 10 F.3d 338, 353-54 (6th Cir. 1993), *cert. denied sub nom*. *Rison v. Demjanjuk*, 513 U.S. 914 (1994) (footnote omitted).

This opinion is not simply precedent, though the government makes an effort to distinguish it. In this litigation between the same parties on the same subject matter and issues, this holding is either law of the case or res judicata as to the rights and obligations of the parties. "A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a subsequent suit between the same parties or their privies.' " *Montana v. United States*, 440 U.S. 147, 153 (1979) (quoting *Southern Pacific Railway Co. v. United States*, 168 U.S. 1, 48-49 (1897) (holding that the United States is not entitled to relitigate issues decided against it in prior lawsuit on the same matters)). If we view this to be the same continuous litigation, the doctrine of law of the case leads to the same conclusion. *See*, *e.g.*, *United States v. Rayborn*, 495 F.3d 328 (6th Cir. 2007); *Litman v Mass. Mutual Life Ins. Co.*, 825 F2d 1506 (11th Cir 1987), *cert. denied*, 484 U.S. 1006 (1988).

Tucked inside footnote 7 of the government's opposition brief is recognition of this Circuit's holding in *Demjanjuk v. Petrovsky*. The government then asserts that the "Sixth Circuit has since limited that holding." Govt. Opp. n.7 (*citing In re Extradition of Drayer*, 190 F.3d 410, 414 (6th Cir. 1999), *cert. denied*, 528 U.S. 1176 (2000)). That is not true.

In *In re Extradition of Drayer*, the Circuit quoted almost all of the above language from *Demjanjuk v. Petrovsky*. It then observed:

> This seemingly broad language must be read in the context of a case that involved an unusual set of circumstances. Because those circumstances are not present in this case, the petitioner is not entitled to the broad relief he seeks. Specifically, in *Demjanjuk*, the United States had conducted its own investigation of the offense underlying the request for extradition and uncovered exculpatory material in the course of that effort. *Id.* No such investigation occurred here; rather, the involvement of the United States can only be characterized as ministerial in the sense that it merely received factual information developed by Canadian authorities. Moreover, all documents received by the United States from Canadian authorities were, in fact, turned over to counsel for petitioner.

In re Extradition of Drayer, 190 F.3d at 414-15. Although it could have done so, the Circuit changed no portion of its 1993 holding.

The Government's Insistence to Compartmentalize Itself

The government reluctantly acknowledges this applicable law, but then flat-out rejects much of it in footnote 2, which is the fulcrum of its argument. That footnote reads:

> For ease of reference in this brief, prosecution team will refer to the relevant offices involved in the investigation and litigation of this action -- namely the Office of Special Investigations (OSI), the Office of International Affairs (OIA), the Criminal Division's Appellate Section, and the United States's Attorneys Office for the Northern District of Ohio.

Govt. Opp. at n.2. This shorthand way to explain why FBI files were not reviewed and produced ignores the law made clear by the Court of Appeals 18 years ago.

> The [Supreme] Court has also made plain that the prosecution cannot escape its disclosure obligation by compartmentalizing information or failing to inform others in the office of relevant information. In *Giglio v. United States*, 405 U.S. 150 ... (1972), the government made the same "the-right-hand-did-not-know-what-the-left-hand-was-doing" argument as it makes here. The Court was quick to reject this excuse as a justification for withholding exculpatory material. The Court pointed out that "the prosecutor's office is an entity and as such it is the spokesman for

> the government." The Court held that the prosecutor's office — here OSI — is responsible as a corporate entity for disclosure.

Demjanjuk v. Petrovsky, *supra*, 10 F.3d at 353. The footnote to this section of the Circuit's opinion reads:

> The full paragraph in which this rule is expressed is as follows:
>
> > In the circumstances shown by this record, neither DiPaoloa's authority nor his failure to inform his superiors or his associates is controlling. Moreover, whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. See Restatement (Second of Agency § 272. See also American Bar Association, Project on Standards for Criminal Justice, Discovery and Procedure Before Trial § 2.1(d). To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.
> >
> > [*Giglio v. United States*,] 405 U.S. at 154, 92 S. Ct. at 766.

Demjanjuk v. Petrovsky, *supra*, 10 F.3d at 353 n.2.

Self-defined prosecution teams are not supposed to wear blinders, but are to err on the side of production. The government admits it once made inquiry of the FBI "per [OSI] standard practice" seeking relevant materials in 1979, the same year OSI was created. Govt. Opp. at 32. But once was not enough — nor was it in compliance with the law.

OSI, now a part of the Human Rights and Special Prosecutions Section, believes it is excused for this lapse because "it had not subsequently partnered with the FBI on this case, the

prosecution team had no basis to suppose that counter-intelligence agents at the Cleveland FBI office had, since the initiation of the first denaturalization case, created documents theorizing that the prosecution team might be relying on forged documents or that anyone at FBI had once harbored concerns about the Justice Department's case. Thus subsequent checks were not made." *Id*. at 32-33.

That is not the standard this Circuit required. Moreover, this lengthy excuse contains no explanation why checking the FBI for possibly relevant or responsive materials was OSI's standard practice in 1979 but not for the next three decades while it was prosecuting Mr. Demjanjuk. The government offers no explanation as to how this Court should square this excuse with OSI's promise that its attorneys' efforts "exceed even the expansive discovery obligations codified in the December 1993 amendments to the Federal Rules of Civil Procedure." Had promises made to the Court been kept, the government would have produced the FBI files decades ago. Moreover, with full disclosure there is a reasonable probability the outcome of Mr. Demjanjuk's second denaturalization would have been different, if it took place at all, and he would not be before this Court today.

After its creation in 1979, OSI was also not apparently following standard Department of Justice policy regarding discovery. According to the United States Attorney's Manual:

> Department policy recognizes that a fair trial will often include examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, result in an acquittal or, as is often colloquially expressed, make the difference between guilt and innocence. As a result, this policy requires disclosure by prosecutors of information beyond that which is "material" to guilt as articulated in *Kyles v. Whitley*, 514 U.S. 419 (1995), and *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999).

USAM § 9-5.001(C).

Moreover, every civil lawyer knows that actual possession is not required for production. The obligation to produce applies if the party has either possession, custody or control or the legal right to obtain the documents on demand. *In re Bankers Trust Co.*, 61 F.3d 465, 469 (6th Cir. 1995). Lack of coordination among persons or elements of the same agency, even if inadvertent, is also unavailing. In *Santobello v. New York*, 404 U.S. 257, 260 (1971), one assistant district attorney had made a plea bargain. Another assistant in the same agency, unaware of the bargain, failed to honor the promise that the state would make no recommendation as to sentence. The Supreme Court observed, "This record represents another example of an unfortunate lapse in orderly prosecutorial procedures, in part, no doubt, because of the enormous increase in the workload of the often understaffed prosecutor's offices. The heavy workload may well explain these episodes, but it does not excuse them." *Id*. at 260.

The Uncontested Importance of the FBI Documents

The government spends pages arguing that a mountain of evidence proves the government has the right John Demjanjuk. A similar mountain presented earlier to this Court, the Circuit, and the District Court and the Supreme Court in Israel crumbled upon inspection. With this backdrop, the government now remarkably admits that:

> Had the prosecution team known of the agents' concerns or the existence of the materials they created, it would have instituted a thorough investigation into the basis for the theories contained in the FBI materials and sought to interview the FBI agents who held those concerns, as it did in 1989, when a similar situation arose during OSI's denaturalization action against Hungarian Nazi propagandist Ferenc Koreh.

Govt. Opp. at 31-32 (*citing* Neil Sher Aff. ¶ 15, Exh. 26). If the documents that were not produced were so important to the government that it would have initiated this kind of investigation, then one

can only imagine just how important they would have been to Mr. Demjanjuk's defense team. Indeed, with these documents in hand, Mr. Demjanjuk may never have needed to face a second denaturalization proceeding. The government cannot have it both ways by saying that the documents would have been so important and material to the government that they alone would have prompted a thorough investigation — and yet not important to the defense's case.

Of course these documents are of great importance to the case. They cast doubt on the entire case. And they are created by the largest, most powerful law enforcement and investigative agency in the country — that is also under the control of the same U.S. Department of Justice that controlled OSI. One can only imagine what the results might have been if in the 1980s or 1990s Mr. Demjanjuk's defense had been able to open up this evidence.

The government claims the Trawniki card was amply tested, and the unproduced FBI documents would not have mattered. The government even derides any assertion the card could have been forged. The OSI's own attitude and actions towards the card, however, contradict those assurances. As OSI Deputy Director, Allan A. Ryan, Jr. went to the Soviet Union in January 1980 to discuss the availability of evidence with respect to several of OSI's pending inquiries. The Trawniki card "had just arrived" at OSI's offices. Wiseman Hearing Tr., Jan. 29, 1993, at 117. While there, Mr. Ryan received a cable from OSI lawyer Norman Moscowitz. Based on that cable, he asked the Soviets for more information on the card, "where it had been the last 38 years." It was important to find this information because the Trawniki card was the key item of documentary evidence against Mr. Demjanjuk. (Other items included the supposed eyewitness testimony of Otto Horn, *id*. at 119, later found by the Sixth Circuit to have been fraudulent.) In the Wiseman hearings, Ryan was asked by a Department of Justice lawyer:

> Q. When you made the request to the Soviet Union, did you always get what you asked for?
>
> A. No.

Wiseman Hearing Tr. 118. The provenance of this card, which mysteriously appeared at OSI while it was convincing the Soviets to help with its work, raised questions from the start.

Ryan convinced the Soviets to release the Trawniki card so that it could be used in the Israeli trial proceedings. He did this by a letter to Rekunkov, the Procurator General of the USSR. As Ryan recalls, " So, I thought if I wrote to him I could remind him we met in January, '80, and if that would do any good to appeal to the Soviet self-interests and tell then what an important case it was in Israel and how it was part of the fight against factious [sic -- should be fascist] war criminals and all the other things that Soviets like to hear." Wiseman Hearing Tr., Jan. 29, 1993, at 93.

This sort of argument about national interest was addressed to a Soviet establishment already skilled in forgery. As noted in the initial motion papers, KGB techniques for forgeries or "disinformation" were often employed for political purposes. For example, in 1986, Soviet agents sought to implicate the Chairman of the Senate Select Committee on Intelligence with a forged letter. The Soviet forgery apparatus was sophisticated, including the use of forged stamps, and of inks and paper that accurately mimic genuine documents. The KGB had a special disinformation or "active measures" department devoted to this activity.

The point here is not to prove anything one way or another. We simply underscore the relevance of the withheld information, and note that it would have been important even to the government's various experts as they did their work. Indeed, we know the sum total of KGB materials on Mr. Demjanjuk have not been turned over to the defense.

The government pretends the defense team was not harmed by this decades-long failure to produce responsive FBI materials. It was the defense team and its witnesses after all who went to the FBI in the 1980s. That contention, though, is way off base for several reasons. First, it overlooks that the law places the discovery obligation on the government, not the defense. Second, it begs what seems to be the unspoken yet unavoidable question: If the defense team had reason to believe decades ago that the FBI was investigating Mr. Demjanjuk's case, how was it possible that one of the most powerful prosecutorial offices within the U.S. Department of Justice did not? All of this comes in the context of the denaturalization, extradition, and deportation proceedings against Mr. Demjanjuk occurring literally blocks down the street from the FBI's Cleveland field office where all of this questioning and investigation were going on. Third, even if someone from the defense team or a witness or merely an interested, defense-friendly citizen had asked the FBI for the documents that support that agency's doubt about the evidence against Mr. Demjanjuk, they would never have received them because those documents were (and some still remain) classified.

OSI/FBI Collaboration

The compartmentalization the government wishes this Court to accept is a leaky sieve with information going back and forth between the FBI and OSI — unless we are to believe that the documents now authenticated by the government's own witnesses contain lies. One need only point to Exhibit E of the defendant's original motion, which is the cover document that accompanied the March 4, 1985 memorandum by Cleveland FBI. It begins:

> Pursuant to instructions of FBIHQ in referenced airtel, Cleveland is enclosing five (5) copies of an LHM captioned as above, to be discussed with USDJ, Office of Special Investigations, in coordination with INTD/CI-1A, and Executive Agencies Unit (EAU).

Deft. Motion, Exh. E. The fact that one of the recipients of this memorandum can no longer remember reading it or acting on it or distributing it does not mean those things were not done. And if they were in fact not done despite the clear instruction, the defense has a right to know why. No affiant helping the government in its opposition has said these words were a lie.

The collaborative efforts between OSI and the FBI are documented elsewhere. Three months earlier the same special agent in charge of Cleveland FBI explained to the FBI Director:

> Cleveland submitted the referenced airtels under an FCI-R caption and requested guidance as to how to proceed. This matter was coordinated with EAU Chief Storm Watkins, who advised that the matter is one that should be more appropriately handled by his unit, which has liaison with the DOJ's OSI regarding alleged Nazi war criminals.

Deft. Reply, Exh. C, at 2. The relationship between the FBI and OSI is explained earlier in that same document.

> Matters related to efforts by the U.S. Government to have captioned subject [John Demjanjuk] denaturalized and deported because of alleged activities as a Nazi prison guard, and information coming to the attention of the FBI bearing upon such efforts, should be submitted, under the appropriate caption, to the attention of the Executive Agencies Unit (EAU), Records Management Division, FBI Headquarters. The EAU has responsibility for liaison with the Office of Special Investigations (OSI), U.S. Department of Justice, which is the Office charged with responsibility for locating and prosecuting Nazi war criminals in the United States.

Id. at 1. As with the document discussed immediately above, no affiant helping the government in its opposition said this was a lie.

The collaboration between the FBI and OSI is also illustrated in a document the government produced for the first time on May 27, 2011. Again with the captioned subject John Demjanjuk and

authored by the special agent in charge of Cleveland FBI, the previously classified document dated April 24, 1986 says:

> For information of captioned file, this writer attended a film presentation at the FBI Conference Room on 4/23/86 at 1:00PM with AUSA GARY R. ARBEZNIK, IVAN I. BEZUGLOFF, JR. and MICHAEL NUSSBAUM. The film came from the Soviet Union and was mailed to the U.S. Attorney's Office. The film essentially purported to present a historical picture of Ukrainian Nationalists/Fascists who were misguided by Bourgeois leaders and outside influences.

Deft. Reply, Exh. D. Why would an assistant United States attorney from Cleveland be meeting with FBI agents at Cleveland FBI reviewing a film the U.S. Attorney's Office received if there was no collaboration between OSI and the FBI? If OSI really did all of its own investigation on Nazi war criminal cases, why was someone from the prosecution team sharing evidence with the FBI? If there was no collaboration between the FBI and OSI on Nazi war criminal cases, how would the assistant U.S. attorney even know to share the evidence with the FBI? Why waste the time doing so if there really was no collaboration?

For the first time, the defense now has an unredacted and declassified copy of the March 4, 1985 memorandum. One newly revealed sentence states:

> The Soviet Union's Ministry of State Security and Intelligence Service, the KGB has long been suspicious of Ukrainian activities and has kept a close watch on Ukrainian emigres, utilizing all manner of coercive methods to quiet their vocal opposition to the Soviet regime.

Deft. Reply, Exh. E, at 1. We also now learn for the first time the memorandum's conclusion:

> Cleveland opines that the instant matter is an extension of Soviet "Active Measures" activities conducted by Line PR of the First Directorate, KGB, designed to demonstrate that the long arm of the KGB, in monitoring the activities of Soviet emigre dissidents, especially those actively engaged in anti-Soviet organizations or

> public expression. The utilization of false information and documentation is a common practice of the KGB.

Id., at 2. In short, the FBI was concerned the KGB was manipulating Department of Justice lawyers. There was also presumably concern that KGB tactics were stifling healthy dissent amongst our own citizens. As stated in the original motion, the importance to the defense of this document and the ones related to it would have been incalculable in this case. While the document may have been expressing only an opinion regarding key evidence in Mr. Demjanjuk's case, it was an opinion coming from the Department of Justice's own investigative arm. That arm was plainly at odds with OSI, but bureaucratic infighting is so often the very stuff of which defense verdicts are made.

This is not the only document the defense team is seeing for the very first time. With its filing on October 18, 2011, the government turned over another stack of 585 declassified documents (still containing some minimal redactions), though many of these documents were previously provided to the defense or obtained directly by the defense from the National Archives. On October 26, 2011, the government provided 60 more documents which the defense never saw before, and portions of which are still classified and thus redacted.

The government did more than just withhold exculpatory documents. It affirmatively elicited testimony deriding the very idea of forgery — while still withholding documents that the law required be produced to allow for a fair trial. In the denaturalization case before then Chief Judge Paul R. Matia, OSI lawyer Jonathan C. Drimmer asked the government's expert witness, Dr. Charles W. Sydnor, Jr. about forgery. The lawyer elicited testimony showing the government was aware of the possibility that documents crucial to the case had been forged, and yet affirmatively presented evidence in opposition to any such idea.

Q. Dr. Sydnor, I think that you mentioned that four of these documents were found in archives that were in the former Soviet Union; is that right?

A. Yes, sir.

Q. Does that face create any doubt in your mind as to the authenticity of those four documents?

A. No, sir. They are captured German records.

Q. And why doesn't it impact at all on your view as to their authenticity?

A. Well, the Soviets treated the documents, knowing what we know about the Soviet Union, the Soviets treated the documents in a way that I, as an historian, I find to be, you know, crude and vandalous. I wouldn't take a historical document and write on it. They defaced the documents, but –

MR. TIGAR: I'm sorry, Your Honor. I didn't hear the word after "crude and" -- vandalous?

THE WITNESS: Vandalous, yeah.

MR. TIGAR: Thank you.

A. They defaced the documents, but they were using them for investigative purposes, and then they used them for prosecutorial purposes.

Q. In your experience, have you seen any instances in which the KGB has forged documents to inculpate an American citizen?

A. No.

Q. Are you aware of any instance in which the KGB –

MR. TIGAR: Excuse me, Your Honor. I object to the answer and ask it be stricken. He's not shown to be an expert on what the KGB has done with respect to American citizens or anyone else.

MR. DRIMMER: Your Honor, he's exactly independent in his qualifications, it is established he's examined wartime documents

> for 33 years, and he's done archival research in numerous archives, including those in the former Soviet Union. And as the defense itself has argued, he did examine a significant number of Russian documents.
>
> THE COURT: The question was, "In your experience have you ever seen any instances," and he may answer that. He's not testifying that that's impossible. He's simply testifying as to whether he has seen any.
>
> A. I'm not aware of any instance in which anyone -- if your question was in matters of these kinds, in my experience have I ever seen an instance in which documents that were in the Soviet Union were forged in some way to incriminate someone in the United States, the answer is no. I'm not aware of that. I haven't seen it in my experience.
>
> Q. In your experience, have you seen any instance in which the KGB has forged documents of the types that we have been talking about this morning, Government's Exhibits 3 through 9?
>
> A. No, sir. In my experience, I haven't seen that.

Denaturalization Hrg. Tr. 437-39 (Exh. B of Deft. Motion filed in its entirety in electronic format on July 19, 2011).

The documents to which Mr. Drimmer and Dr. Sydnor were referring in repudiating a forgery contention included the Trawniki service pass number 1393. If that pass is not authentic or ever belonging to Mr. Demjanjuk, then none of the other documents in evidence refers to the individual in this case. This testimony from the government's own expert witness demonstrates the central importance of the pass. The government's case could not stand on other documentary evidence. On cross-examination, Dr. Sydnor said the following:

> Q. Dr. Sydnor, when we finished up on Friday, we were talking about some methodological questions. Now, in your direct examination, sir, you told us about wartime documents that contain a name like Demjanjuk, correct?

A. Yes, sir.

Q. And there are seven of those?

A. Yes, sir.

Q. And in your opinion, the first in time is Government's Exhibit 3; is that correct?

A. If that is the –

Q. That's the card, the service pass.

A. Yes, sir, I believe that's the first one chronologically.

Q. In your opinion, sir, if number 3 does not refer to or describe, is not the card of, the man on trial here, then the other six aren't either; is that right?

A. Let me answer by making certain we're talking about the same document. Number 3 would be the –

Q. Let me not be other than completely careful. May the witness be shown the exhibit books, please, the first one that has the -- exhibit book one. Doctor, if at any time I ask a question about a document and you want to look at it, please let me know.

A. Yes, sir.

* * * * *

Q. All right. Turn, please, to Government's Exhibit 3 and tell us whether or not that is the service pass.

A. Yes, sir. Government's Exhibit 3 is the service identification pass number 1393.

Q. And if 1393, as described on that pass, is not John Demjanjuk, the defendant now on trial, then none of the other government exhibits refer to him either, is that correct? Would you agree with that?

A. Yes, sir, I would have to agree to that.

Denaturalization Hrg. Tr. 673-74.

Other testimony shows Dr. Sydnor was apparently willing to adopt and vouch for whatever theory OSI was presenting at any given time. Speaking of the now discredited "Ivan the Terrible" theory, Dr. Sydnor publicly said that Mr. Demjanjuk was a "monster," and that the cause of justice "will have never been better served" by his hanging. Denaturalization Hrg. Tr. 320-21. He also publicly derided what he called "the disproven theory of mistaken identity." *Id.* at 322-23. He said these things apparently without having full knowledge even of basic information relevant to his own statements.

> Q. So as you sit there today, you don't know whether the nondisclosure of the Soviet materials had to do with what the Americans were doing or what the Soviets were doing or both, correct?
>
> A. That's correct.

Id. at 343.

These exchanges show government counsel knew forgery was an issue, and decided to use the government's principal expert to rebut it. If the Trawniki card is a forgery or refers to someone other than the individual in this case, the entire case against Mr. Demjanjuk collapses. Given this earlier testimony from the government's own expert witness, the government cannot successfully challenge the materiality of the unlawful *Brady* suppression here. In the context of a criminal case, "[t]he reversal of a conviction is required upon a 'showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' " *Youngblood v. West Virginia*, 547 U.S. 867, 870 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)). The withheld evidence comes from the largest crime investigative entity in our country. Being able to show a district judge sitting in judgment in this case that the FBI's own agents question the reliability of the key evidence in this case is something that would not be taken

lightly. The public's voice already expressed since the AP article appeared in April demonstrates just how deeply the lack of confidence in the judgment against Mr. Demjanjuk runs because of government misconduct.

This is not, therefore, merely a case of withheld discovery. Government counsel knew or should have known that there was indeed evidence of forgery. They should have shared that information with their expert. They then presented evidence from that expert they knew or should have known was at least misleading and at worst a deliberate falsehood. *See United States v Wallach*, 935 F.2d 445, 446 (2d Cir. 1991) (holding government counsel is responsible for what they knew and "should have known" in questioning a perjurious government witness, noting that counsel may have "consciously avoided recognizing the obvious"); *Drake v. Portuondo*, 553 F.3d 230, 243-44 (2d Cir. 2009) (predicating relief in part on the prosecutor's having elicited misleading testimony from an expert while resisting defense efforts to investigate and learn that the expert's conclusions could be rebutted). The cases often speak of "perjury," but what they really tell us is that prosecutors cannot sponsor falsehood of any description. *See, e.g.*, *United States v. Vozzella*, 124 F.3d 389, 392 (2d Cir. 1997).

Dr. Sydnor may have been unaware of the withheld FBI information because despite OSI having given him thousands of pages of material to prepare his report and testimony, they withheld the FBI information from him as well. But using an arguably innocent person to perpetrate a wrong establishes culpability, too.

Extraordinary Circumstances Requiring Rule 60 Relief

The exceptional or extraordinary circumstances required for relief under Fed. R. Civ. P. 60(b)(6) or the unusual or exceptional circumstances required for relief under Fed. R. Civ. P.

60(d)(1) and (3) are present in this case. This is one of those highly unusual cases where the government was already found to have lied to federal judges at both the district and appellate levels, and to federal judges in another country. Those lies put a wrongfully accused man on another country's death row to await execution. Government lawyers then promised not to break the rules again after a finding of fraud on the court was made. The government chose to act contrary to its promises.

The government responds by arguing that a motion made pursuant to Fed. R. Civ. P. 60(b)(3) is untimely. Govt. Opp. at 40. Mr. Demjanjuk, however, did not make his motion pursuant to this particular provision of Rule 60. Consequently, the time limits applicable to that provision do not apply.

Now that it has been called out for its fraudulent and reprehensible conduct, the government declares that the way it defined the prosecution team relieves it of any legal obligation to review FBI files for relevant materials even though recently declassified documents clearly show intra-agency collaboration. Given the notoriety of this case and the well-publicized public demonstrations of support and opposition it engendered, it did not take much to know that the FBI was involved in Nazi war criminal cases, including this one. OSI failed to heed the blunt warnings from the Court of Appeals and this Court; failed to heed its own promises to the Courts; and failed to heed its own internal policies. The injustices wrought by this case result from the failures of government lawyers to meet their legal obligations.

The Supreme Court has spoken bluntly on the appropriate consequences for explainable but inexcusable wrongdoing of this kind. In *Nat'l Hockey League v. Metro. Hockey Club,* 427 U.S. 639, 642-43 (1976), the Court upheld a district judge's dismissal of an antitrust case under Fed. R.

Civ. P. 37 as a sanction for failure to make discovery and for far less egregious obstructionist tactics. "[H]ere, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. If the decision of the Court of Appeals remained undisturbed in this case, it might well be that these respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts." *Nat'l Hockey League*, *supra*, 427 U.S. at 642-43.

Whether viewed from a civil or criminal context, the appropriate remedy is reversal and dismissal. Adjudicating accountability for Nazi atrocities must be a process that complies, for both substantive and symbolic reasons, with the rule of law in every regard. We do not seek to hold the government to a higher standard in this instance — merely to the standard required by law.

An inscription outside of the Attorney General's Office reads: "The United States wins its point whenever justice is done its citizens in the courts." Mr. Demjanjuk was once one of those citizens who was not done justice. While a United States attorney "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1935), *overruled on other grounds Stirone v. United States*, 361 U.S. 212 (1960). Rule 60 is part of our system's civil rules to make sure we have a tool to correct situations resulting from foul blows struck by the government. Thankfully corrective action is needed only rarely. This is one of those rare instances.

Conclusion

Accordingly, for the foregoing reasons and for the reasons set forth in his initial brief and motion papers, Mr. Demjanjuk asks :

1. The Court schedule this matter for oral argument upon completion of all briefing;

2. The Court authorize such further discovery and order factual hearings as are necessary to complete the record on the claims presented in the instant motion; and

3. Upon the conclusion of such proceedings, the Court set aside the judgment of Mr. Demjanjuk's denaturalization with prejudice.

Respectfully submitted,

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November 1, 2011

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2011, a copy of the foregoing Reply Brief of John Demjanjuk in Support of Motion Pursuant to Fed. R. Civ. P. 60 (together with exhibits) was filed electronically or by filing with the Office of the Clerk digital media containing Exhibit A. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic receipt. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's system. In light of the fact that an electronically formatted exhibit was filed with the Court on digital media, I further certify that on the above date a copy of this reply brief and Exhibit A filed separately with the Office of the Clerk were also provided to counsel of record by overnight courier.

/s/ Dennis G. Terez
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One of the Attorneys for John Demjanjuk